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ORIX CREDIT MALAYSIA SDN BHD

v.

M/S BELQUIP SDN BHD & ORS

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HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH JC
[SUIT NO: 22-18-2001-III (II)]
26 FEBRUARY 2007

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CONTRACT: *Guarantor - Guarantee - Liability - Claim against fifth defendant as guarantor for hire purchase agreement entered between first defendant and plaintiff - Judgment in default entered against first defendant - Whether seriously challenged by fifth defendant - Whether hire purchase agreement ought to be struck down - Non receipt of notice of*

D

demand - Allegation of - Whether sent to address set out in guarantee agreement - Whether sum claimed included interest on interests - Whether judgment for the plaintiff

E

This proceeding arose from a claim by the plaintiff against the fifth defendant as a guarantor under a guarantee and indemnity (guarantee agreement) in which he guaranteed the liability of the first defendant under a hire purchase agreement entered between the first defendant and the plaintiff (hire purchase agreement). The fifth defendant denied his liability, *inter alia*, on the grounds that

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the plaintiff was in fact involved in money lending without the appropriate license and also certain terms of the hire purchase agreement were immoral and against public policy and hence should be struck down. The facts were that the plaintiff had extended a hire purchase facility to the first defendant for the

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purchase of a unit of Mitsubishi AD250 Articulated Dumper (Dumper). As part of the security for the aforesaid finance, the fifth defendant executed a guarantee agreement in which he promised to pay whatever was owed by the first defendant under the hire purchase finance facility. The first defendant defaulted

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under the hire purchase agreement and as a result, judgment in default had been entered on 11 April 2001 and the same had not been set aside by the first defendant. In proving its case, the plaintiff had relied on the evidences of PW1 and PW2 who showed the court in details how the claim was arrived at together

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with supporting documents and also what kind of steps the plaintiff took to dispose of the repossessed Dumper. Secondly, it relied on the judgment against the first defendant to prove the

amount claimed. The defendant submitted that there was no payment of the cash deposit of RM335,000 to the supplier of the Dumper. The fifth defendant also alleged that no notice of demand was issued to him and that the amount claimed included interests on interests, which it was contended was not allowable in law.

Held:

(1) There was no requirement on the part of the plaintiff to adduce evidence to prove quantum and the correctness of the amount claimed if the judgment in default against the first defendant was produced. Here, not only did PW1 produce the judgment against the first defendant, she and PW2 also adduced ample evidence to show how the amount claimed was calculated. The judgment in default against the first defendant had not been seriously challenged by the fifth defendant. (para 13)

(2) Until such time that the judgment in default against the first defendant is set aside he had not discharged the burden of disproving the amount claimed. The fifth defendant as a director of the first defendant until after this trial had started did not take steps to set aside the judgment against the first defendant. In any event, the fifth defendant had agreed to the conditions stated in cl. 2 of the guarantee agreement and the fifth defendant had not given reasons as to why this court should not give effect to them. Further, the detailed and direct evidences of PW1 and PW2 had not been rebutted at all by the fifth defendant. (paras 13, 14 & 15)

(3) In respect of the contention that the hire purchase agreement was in fact a money lending agreement and ought to be struck down as the plaintiff did not possess a moneylending license, this was based on the allegation that the cash deposit of RM335,000 stated in the hire purchase agreement was never paid by the first defendant. In any event, even if there was no payment of the cash deposit, this did not affect the liability of the fifth defendant. As far as the plaintiff was concerned, they were providing hire purchase financing to the first defendant. There was no evidence to show that the plaintiff, first defendant and the supplier were involved in one big conspiracy of fraud or some other illegal acts. (para 16)

(4) As for the non-receipt of the notice of demand by the fifth defendant, the evidence had not been seriously challenged in court by the fifth defendant. The letter of demand was sent to the address set out in the guarantee agreement and when there was no notice of change of address to the plaintiff, the fifth defendant could not complain that he had not received it. The presumption was that he had received it unless proven otherwise, which the fifth defendant had failed to do. (para 17)

(5) The sum claimed did not include interest on interests. It was interests charged on overdue monthly installment which was provided for in the hire purchase agreement. In any event compound interest was allowable when the parties had agreed to it. Hence, this court entered judgment for the plaintiff. (para 18)

[Order accordingly.]

Case(s) referred to:

Cempaka Finance Bhd v. Ho Lai Ying (trading as KH Trading) & Anor [2006] 3 CLJ 544 FC ***(refd)***

Trengganu State Economic Development Corp v. Nadefinco Ltd [1982] 1 MLJ 365 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 11(a)

For the plaintiff - Lau Mei Ling; M/s Sim & Yee
For the 5th defendant - Chan Kay Heng; M/s Chan & Chan

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah JC:

Proceeding

[1] This proceeding arises from a claim by the plaintiff against the 5th defendant as a guarantor under a guarantee and indemnity dated 6 November 1996 (guarantee agreement) in which he guaranteed the liability of the 1st defendant under a hire purchase agreement also dated 6 November 1996 entered between the 1st defendant and the plaintiff (hire purchase agreement). The 5th

defendant denies his liability, *inter alia*, on the grounds that the plaintiff is in fact involved in money lending without the appropriate license and also certain terms of the hire purchase agreement are immoral and against public policy and hence should be struck down.

Undisputed Facts

[2] The plaintiff extended a hire purchase facility to the 1st defendant for the purchase of a unit of Mitsubishi AD250 Articulated Dumper (Dumper). This hire purchase facility is evidenced in exh. P3. As part of the security for the aforesaid finance, the 5th defendant executed a guarantee agreement in which he promised to pay whatever was owed by the 1st defendant under the hire purchase finance facility. This guarantee agreement is evidenced in exh. P6. The 1st defendant defaulted under the hire purchase agreement and as a result, judgment in default had been entered on 11 April 2001 and the same had not been set aside by the 1st defendant. Judgment in default was entered against the 5th defendant and the same was set aside by me on 20 June 2006. The 5th defendant at the material time was both a director and shareholder of the 1st defendant.

Plaintiff's Case

[3] In proving its case the plaintiff used two modes, firstly by direct evidence from PW1 and PW2 and secondly pursuant to cl. 2 of the guarantee agreement which reads as follows:

> 2. An acknowledgement in writing by the Hirer of the Hirer's indebtedness under the Hire Purchase Agreement (whether such acknowledgement be express or implied) shall be conclusive evidence of such indebtedness against me/us and any judgment or order obtained against the hirer shall be binding on me/us and I/we shall be precluded from disputing the hirer's liability as determined by the said judgment or order.

[4] PW1, who was the operating officer in charge of the plaintiff Kuching branch at the material time gave oral evidence to the effect that the plaintiff had financed the 1st defendant in the sum of RM1,015,000 for the purchase of a unit of a Dumper and the same was to be repaid by 36 installments as set out in the hire purchase agreement. The hire purchase facility was guaranteed by the 4th and 5th defendants. Further, she testified that the 1st

defendant had defaulted under the hire purchase agreement resulting in repossession of the Dumper which was sold off by tender by the plaintiff for the sum of RM190,000. PW1 also took the court through para. 5 of the statement of claim which states as follows:

Particulars

Cash Price	–	RM1,350,000.00
Less - Deposit	–	RM 335,000.00
		RM1,015,000.00
Add – Term Charges	–	RM 233,867.00
		RM1,248,876.00
Less – Installments paid		RM 174,455.00
		RM1,074,421.00
Add – Overdue Interest at 0.065% per day Till 25/10/2000		RM 167,543.93
Storage Fee		RM 2,327.95
Freight/Towing		RM 1,059.00
Legal fees		RM 277.50
Insurance, advertisement, Sundry Debit & Postage		RM 1,540.51
		RM1,247,169.89
Less – Statutory rebate available till 27.03.98		RM 66,721.38
		RM 1,180,448.51
Less – Sales Proceeds		RM 190,000.00
		RM 990,448.51
Add – Interest at 0.065% per day on shortfall Amount of RM817,699.62 from 26.10.2000 To 8.12.2000 (43 days)		RM 22,854.70
		RM1,013,303.21

[5] In the tender process, she also testified that the plaintiff had taken all steps to ensure the best price was obtained and the 1st defendant and 5th defendant had been informed of the repossession exercise. This part of the testimony is evidenced by the various letters to the 1st and 5th defendant, the invitation of tender, and the agreement between the successful bidder of the Dumper. The relevant exhibits are P15 (letter of intended sale by plaintiff to 1st defendant), P16 (Advertisement for tender), P17 (tender form of successful bidder) and P18 (Offer of sale to successful bidder).

[6] PW2, who was the senior officer for credit control of the plaintiff, was called to testify on how the figures for Term Charges, Statutory Rebate, Shortfall Amount and Chargeable interests were arrived at. In doing so, she produced exh. P31(a) and (b) to show how those figures were arrived at. For clarity, I reproduce exh. P31(a) and (b) in full:

STATEMENT OF ACCOUNT

ACCOUNT NO. : 104-1996-00738-5
HIRER : BELQUIP SDN BHD
VEHICLE/EQUIPMENT : ONE UNIT NEW MITSUBISHI AD250 ARTICULATED DUMP TRUCK
REGISTRATION NO. : QTA 4695

No.	Due Date	Payment Date	No. of Days	Overdue Interest	Calculation of Overdue Interest
1	6/12/96	13/3/97	97	2,187.27	(RM34,691.00 x 0.065 % x 97 days)
2	6/1/97	25/3/97	78	1,758.83	(RM34,691.00 x 0.065 % x 78 days)
3	6/2/97	31/3/97	78	1,758.83	(RM34,691.00 x 0.065 % x 78 days)
4	6/4/97	9/5/97	33	744.12	(RM34,691.00 x 0.065 % x 33 days)

5	5/5/97	14/8/00	1,135	25,593.29	(RM34,691.00 x 0.065 % x 1135 days)
6	14/6/00	25/10/00	133	2,912.59	(RM33,691.00 x 0.065 % x 133 days)
7	6/6/97	25/10/00	1,237	27,893.30	(RM34,691.00 x 0.065 % x 1237 days)
8	6/7/97	25/10/00	1,207	27,216.82	(RM34,691.00 x 0.065 % x 1207 days)
9	6/8/97	25/10/00	1,176	26,517.80	(RM34,691.00 x 0.065 % x 1176 days)
10	6/9/97	25/10/00	1,145	25,818.78	(RM34,691.00 x 0.065 % x 1145 days)
11	6/10/97	25/10/00	1,115	25,142.30	(RM34,691.00 x 0.065 % x 1115 days)
	TOTAL			167,543.93	

Term Charges

Monthly instalment of RM34,691.00 x loan tenure of 36 months - RM1,248,876.00. Then, RM1,248,876.00 (Total payment amount) less RM1,015,000.00 (Amount financed) – Term charges of RM233,876.00.

Statutory Rebate

The statutory rebate is calculated up till the date of expiry of the Notice of Repossession. The amount of RM66,721.38 is derived as follows:

Term of Agreement	:	36 months
Paid	:	5 months
Overdue	:	11 months
Months to run/ installments not paid	:	19 months

Calculation of rebate : 19 (19+1) divided by 36 (36+1) x Term charges of RM233,876.00 - RM66,721.38

Shortfall Amount

This shortfall amount of RM817,699.62 is derived from the sum of RM1,074,421.00 less rebate of RM66,721.38 and sale proceeds of RM190,000.00, which is as follows:

Cash Price	:	RM 1,350,000.00
Less: deposit	:	RM 335,000.00
		RM 1,015,000.00
Add: Term charges	:	RM 233,876.00
		RM 1,248,876.00
Less: Instalments paid	:	RM 174,455.00
		RM 1,074,421.00

[7] In respect of the second mode of proof, the judgment against the 1st defendant (exh. P7) was tendered pursuant to cl. 2 of the guarantee agreement.

The Defendants' Case

[8] The defense called three witnesses. DW1, the 5th defendant, took the stand to testify on his behalf and his testimony is one of "I don't know" and "I don't remember". He also testified that there was no payment of the cash deposit of RM335,000 to the supplier of the Dumper. These allegations of course must be viewed together with the other evidences, one of which was the undisputed fact of his admission of having signed the relevant minute of the 1st defendant to purchase the Dumper and the guarantee agreement. There was also no allegation that he did not understand what he was signing. As for DW2, who is the father of DW1 and a sitting Sarawak Senator of the House of the Senate, his testimony tells of one company called Intro Progress Sdn. Bhd. which acted as an umbrella company and recommended the financier to provide finance for companies under the umbrella company. He testified that the 1st defendant was one of those companies which he recommended to the plaintiff to provide finance. And as far as he knew the 1st defendant like the

other companies under his umbrella company did not have the money to pay the cash deposit of RM335,000. He of course does not hold any position or shareholding in the 1st defendant.

[9] The 5th defendant also alleged that no notice of demand was issued to him and that the amount claimed included interests on interests, which it is contended is not allowable in law.

Findings Of The Court

[10] It is trite law that the burden of proving the claim lies with the plaintiff. If at the end of the plaintiff's case, a *prima facie* case is established the burden is shifted to the defendant to rebut the plaintiff's case. If of course no *prima facie* case had been established by the plaintiff, then there is nothing for the defendant to rebut.

[11] In discharging this burden, the plaintiff firstly relied on the evidences of PW1and PW2 who showed the court in details how the claim was arrived at together with supporting documents and also what kind of steps the plaintiff took to dispose of the repossessed Dumper. Secondly, it relied on the judgment against the 1st defendant to prove the amount claimed.

[12] I shall first deal with the legal effect of the conclusive clause set out earlier. There is an abundance of cases on this area of law but suffice for this court just to refer to the latest Federal Court decision in *Cempaka Finance Bhd. v. Ho Lai Ying (trading as KH Trading) & Anor* [2006] 3 CLJ 544 which held as follows:

> In the result, the Court of Appeal took the position that the conclusiveness of the certificate of indebtedness exh. P3 was binding only upon the parties and that the court would still have to determine whether sufficient evidence had been adduced to prove quantum and the correctness of the amount claimed. With respect, such a proposition goes against the entrenched principles enunciated by Raja Azlan Shah CJ (Malaya) (as His Highness then was) in *Citibank NA v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282 when he said, *inter alia*:
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> > We have often said in this court many a time that where the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the assistant registrar or the judge in chambers, or, for that matter, this court shall not deal with the whole matter under the RSC O. 14 procedure. In the present

> case, the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. It means that, for the purpose of fixing liability of the respondents, the Company's indebtedness may be ascertained conclusively by a certificate.

The above dictum establishes firmly the conclusive nature and extent of a certificate of indebtedness. A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claim. (emphasis added)

In the instant case, the relevant cll. 27 and 7.03 of the loan agreement and guarantee agreement respectively are sufficiently clear. A clause of this nature has been described as a conclusive evidence clause. Such a clause has been held to be binding and valid by courts in Australia and England. In *Dobbs v. National Bank of Australia* [1953] 53 CLR 643, the Australian court made the following observation which we think is instructive:

> The bank could recover without the production of a certificate if, by ordinary legal evidence, it proved the actual indebtedness of the customer. But the (conclusive evidence) clause, if valid, enables the bank by producing a certificate to dispense with such proof. It means that for the purpose of fixing the liability of a surety, the customer's indebtedness may be ascertained conclusively by a certificate. But the manifest object of the clause was to provide a ready means of establishing the existence and amount of the guaranteed debt and avoiding an inquiry upon legal evidence into the debits going to make up the indebtedness.

[13] The above dictum is clear and it is this. There is no requirement on the part of the plaintiff to adduce evidence to prove quantum and the correctness of the amount claimed if the judgment in default against the 1st defendant is produced. In the present case not only did PW1 produce the judgment against the 1st defendant, she and PW2 also adduced ample evidence to show how the amount claimed was calculated. The judgment in default against the 1st defendant had not been seriously challenged by the 5th defendant except to say that the hire purchase agreement was in fact a loan transaction. The 5th defendant has a big hurdle to overcome and it is this. Until such time that the judgment in default against the 1st defendant is set aside he had

not discharged the burden of disproving the amount claimed. It should be noted that the 5th defendant as a director of the 1st defendant until after this trial had started did not take steps to set aside the judgment against the 1st defendant. This belated application was in direct response to what was happening in this trial.

[14] In any event the 5th defendant had agreed to the conditions stated in cl. 2 of the guarantee agreement and learned counsel for the 5th defendant, Mr. Chan Kay Heng (Mr. Chan) has not given me reasons why this court should not give effect to them.

[15] Further the detailed and direct evidences of PW1 and PW2 had not been rebutted at all by the 5th defendant.

[16] In respect of the contention that the hire purchase agreement was in fact a money lending agreement and ought to be struck down as the plaintiff did not possess a moneylending license, Mr. Chan based it on the allegation that the cash deposit of RM335,000 stated in the hire purchase agreement was never paid by the 1st defendant. If I were to concede to Mr. Chan's submission I would be ignoring documentary evidences such as exhs. P4 (invoice by Alquip Sdn. Bhd. to plaintiff), P5 (board meeting minutes of the 1st defendant dated 6 November 1996 approving the hire purchase agreement) and P6 (guarantee agreement). The witness who needed to be called is someone from the supplier Alquip Sdn. Bhd. Only they can confirm whether the allegation is correct. In any event, even if there was no payment of the cash deposit, I do not see how it affects the liability of the 5th defendant. As far as the plaintiff is concerned they were providing hire purchase financing to the 1st defendant. There is no evidence to show that the plaintiff, 1st defendant and the supplier were involved in one big conspiracy of fraud or some other illegal acts. In fact had the Bakun Project succeeded, the 1st defendant would have benefited from the hire purchase agreement and there would not have been any allegation of any improper dealing.

[17] As for the non receipt of the notice of demand by the 5th defendant, the evidence (exh. P14 – the letter of demand to 5th defendant dated 18th December 2000) had not been seriously challenged in court by the 5th defendant. The letter of demand was sent to the address set out in the guarantee agreement and

when there is no notice of change of address to the plaintiff, the 5th defendant cannot complain that he had not received it. The presumption is that he had received it unless proven otherwise, which the 5th defendant had failed to do.

[18] Finally, on the contention that the sum claimed included interests on interests and hence not allowed by s. 11(a) of the Civil Law Act, my view is that the sum claimed did not include interests on interests. It was interests charged on overdue monthly installment which is provided for in the hire purchase agreement. In any event compound interest is allowable when the parties had agreed to it and I refer to what was stated by Salleh Abbas FJ (as he then was) sitting as a High Court judge in *Trengganu State Economic Development Corp v. Nadefinco Ltd* [1982] 1 MLJ 365 at pp 368-369, when dealing with that contention, *viz*:

> The short answer to this submission is that the interest chargeable in this case is not based on the statutory discretion given to the court under s. 11 of the Civil Law Act, or under any other Act, but upon the agreement of the parties as evinced in exh. P2, P3 and P4. Furthermore the language of s. 11 itself leaves no room for doubt that in cases not covered by the section the court is not prohibited from giving interest upon interest. The fact that the court is not authorised does not mean that it is prevented from doing so. What therefore is the principle upon which the plaintiffs could claim the calculation of interest at rests?
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> ... It is therefore obvious that as a matter of law compound interest could be allowed by the court if there are circumstances showing that the accounting party has made profits and derived benefits by withholding the money. This principle was reaffirmed by Lord Hatherley LC in *Burdick v. Garrick* [1869-70] LR 5 Ch Ap 233 as being a sound principle

[19] For all the reasons stated above, I enter judgment for the plaintiff on terms as stated in prayers (1) (2) and (3) of the statement of claim (encl. 98). As for prayer (3) of the same, it is to be taxed unless agreed.